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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

BRUCE A. LOKEN,
Petitioner

v.

CENTURY 21-AWARD PROPERTIES,
Respondent

On Petition for A Writ of Certiorari to the California Court of Appeals Fourth Appellate District, Division One

PETITION FOR A WRIT OF CERTIORARI

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November 21, 1995

QUESTIONS PRESENTED

1. Whether, in a case of first impression where a party has prevailed against a real estate licensee under a statute which specifically states that the limitation of actions for fraud is three-years, it is it is arbitrary, capricious and unreasonable in violation of federal substantive due process under the Fourteenth Amendment of the U.S. Constitution for the state to then enforce a statute which is silent as to a limitation on actions for fraud as establishing a two-year limitation on fraud for real estate licensees.

2. Whether, in a case of first impression where a party has prevailed against a real estate licensee under a statute which specifically states that the limitation of actions for fraud is three-years, it is it is arbitrary, capricious and unreasonable in violation of federal equal protection under the Fourteenth Amendment of the U.S. Constitution for the state to then enforce a statute which is silent as to a limitation on actions for fraud as establishing a two-year limitation on fraud for real estate licensees.

The caption of the case does not contain the name of Jim E. Carmichael, real estate salesperson for Century 21-Award Properties who is also a respondent herein.

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Petition For Writ Of Certiorari To The California Court Of Appeals, Fourth Appellate District, Division One

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PETITION FOR WRIT OF CERTIORARI

Bruce A. Loken respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeals, Fourth Appellate District, Division One, Petition for Review of the case having been denied by the California Supreme Court on September 21, 1995.

OPINIONS AND ORDERS BELOW

The opinion of the California Court of Appeals is reported at 36 Cal.App.4th 263. Appendix (APP.), *infra*, A1-A18. The judgment of the Superior Court is

unreported. It is reprinted in the Appendix, *infra,* A20 - A22. The refusal of the California Supreme Court to grant review (APP., *infra,* A19) is not reported.

JURISDICTION

The California Court of Appeal entered its judgment on June 28, 1995. The California Supreme Court refused to grant review on September 21, 1995. The jurisdiction of this Court is invoked under 28U.S.C. 1257(A).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides in pertinent part:

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, except on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall any private property be taken for public use, without just compensation.

AMENDMENT XIV, SECTION 1

All persons born in or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of laws.

The California Constitution, states:

ARTICLE I, SECTION 7

Sec. 7. (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceeds those imposed by the Equal Protection Clause of the 14th Amendment of the United States Constitution with respect to the use of pupil school assignment or pupil transportation.

Sec. 7. (b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.

ARTICLE IV, SECTION 16

Sec.16. (a)All laws of a general nature have uniform operation.

(b) A local or special statute is invalid in any case if a general statute can be made applicable.

The California statutes applicable to this matter are: Code of Civil Procedure §338 subdivision (d) and Civil Code §2079, which provide, in part:

Code of Civil Procedure §338:

Three years; . . .fraud or mistake;. . . .
(d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

Civil Code §2079 :

(a) It is the duty of a real estate broker or sales person licensed under Division 4 (commencing with Section 10000) of the Business and Professions Code, to a prospective purchaser of residential real property comprising one to four dwelling units. . .to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that such an investigation would reveal, if that broker has a written contract with the seller to find or obtain a buyer or is a broker who acts in cooperation with that broker to find and obtain a buyer.

§2079.4 In no event shall the time for commencement of legal action for breach of duty

imposed by this article exceed two years from the date of possession, which means the date of recordation, the date of close of escrow, or the date of occupancy, whichever occurs first.

STATEMENT OF THE CASE

I. THE FACTUAL BACKGROUND

Petitioner, a U. S. Navy submarine sailor on active duty, purchased a single family residence through Respondent, the listing broker. Because of sea duty and the refusal of the broker to provide access to the house, Loken was denied the opportunity to conduct an inspection of the premises prior to purchase. Loken relied heavily upon the representations made to him by the selling broker, Century 21-Award Properties through its sales person, Jim E. Carmichael.

After two years of ownership wherein sea duty and personal reasons made his occupancy of the house sporadic and minimal, petitioner left the Navy and commenced full time residence in the home. He shortly thereafter noted movement and cracking of the walls of the residence. An intensive further investigation of the structure was conducted and only after the wall to wall carpeting was taken up was a substantial crack in the cement slab floor of the below grade level of the three level residence discovered. Evidence in the form of distortions in the carpeting, carpet laying glue present in the deep and wide crack of the cement slab, and exterior cement cracks at the level of the slab indicated that the immediately prior owner had to know of the presence of the crack and that an experienced Realtor conducting a

reasonable visual inspection would have detected the presence of that crack.

Suit alleging fraud was brought against Century 21-Award Properties and Jim E. Carmichael under California Code of Civil Procedure Section 338.(d) the statute which imposes a three year limitation, commencing upon discovery of the fraud, on such action. Other causes of action were alleged against the seller of the house, Loken's buying broker and a contractor who had inspected the house.

II. PROCEEDINGS IN THE COURTS BELOW

At trial Century 21-Award Properties sought to have the fraud counts of the complaint dismissed as time barred, arguing that a recently enacted statute, California Civil Code Section 2079.4, placed a two-year limitation on the liability of a real estate broker for a breach of his/her duty, as that duty is set forth in Section 2079 et seq. The statute also provides that the two years run from the date the prospective buyer takes possession of the property.

The trial court ruled that the three year limitation on fraud applied rather than the two year limitation set forth in Section 2079, et seq, which lists the duties of a selling real estate broker owed to a purchaser but does not include any mention of fraud on the part of the broker and the consequences of such an act.

The decision of the trial court (APP. *infra,* A20-22) found all defendants liable to Loken on one or more causes of action and specifically found Century 21-Award Properties and its real estate sales person, Jim E.

Carmichael, liable in fraud. Century 21-Award Properties appealed the decision of the trial court on its own behalf and on behalf of Jim E. Carmichael

The California Court of Appeals reversed the decision of the trial court (APP. infra, A1- A18). It held that the two year limitation on actions contained in California Civil Code Section 2079.4 applied to a fraud of the broker, and Loken's claim was therefor time barred.

Appellant Loken's Petition for Review was denied by the California Supreme Court (APP. infra, A19).

REASONS FOR GRANTING THE PETITION

The California Court of Appeals, faced with a challenge to the statute in question here, California Civil Code Section 2079 et seq., created an intent of the Legislature to include fraud in the two-year limitation of the act. This despite the fact that neither the statute nor its legislative history makes any mention of, or allusion to, real estate licensee fraud. The statute and the history speak only of the imposition of a two-year limitation for the breach of its provisions.

By its vague and indefinite statute the Legislature created a facially unconstitutional denial of substantive due process in violation of the Fourteenth Amendment of the U. S. Constitution.

By its interpretation of the statute, wherein it read into the statute a hidden intent of the Legislature to reduce the limitation on real estate licensee fraud to two years,

The Appellate Court denied Loken his right to substantive due process of law, all in clear violation of the Fourteenth Amendment of the U. S. Constitution.

In furtherance of its legislative intent, the Legislature created a special class to be the subject of Section 2079, et seq. That class itself is vague and indefinite because the Legislature states that the purpose of the act is 1) to protect the class of prospective home buyers in that the real estate licensee will be able to obtain insurance for breach of the statute and 2) to protect the class of real estate licensees who will benefit from obtaining such insurance (APP, *infra,* A1-A18).

The creation of these imprecise, internally mutually exclusionary classes created a facially unconstitutional denial of equal protection under the law in violation of the Fourteenth Amendment of the U. S. Constitution.

The issues herein present an important federal question of the loss, to the citizens of the State of California, of the protection afforded by the Fourteenth Amendment to the U. S. Constitution.

I. This court should resolve the conflict between the statute enacted by the California Legislature and the provisions of the Fourteenth Amendment to the U. S. Constitution so as to afford due process to the citizens of California.

The limitation on actions in fraud has been set at three years since the enactment of California Code of Civil

Procedure §338 in 1872. In 1985, at the urging of the California Realtors Association, the Legislature enacted Civil Code §2079 et seq. Civil Code §2079 et seq., speaks of a breach of its provisions but makes no mention of fraud.

As is fully discussed in fn 3 on page A6 of the appellate court opinion, the Legislature claims to see the need for codification and clarification of the holding in *Easton v. Strassburger* (1984) 152 Cal.App.3d 90. *Easton* did not deal with fraud. The Legislature, through 2079 et seq., restates what the prospective purchaser has always regarded to be the duty of a broker namely, use good common sense and make an effort consistent with your education and experience (See §§2079 through 2079.4). The Legislature then goes on to except certain transactions from the statute (§2079.6); to instruct the broker to provide the buyer or prospective buyer with consumer information booklets produced by others (§2079.7 environmental hazards), (§§2079.8, 2079.9 and 2079.11 earthquake safety), (§2079.10 home energy rating); and, to no surprise, to increase the liability of the *buyer* or prospective buyer by requiring them to take a *caveat emptor* position (§2079.5). None of the above appears in *Easton*.

The Legislature then adds another reason for enacting 2079 et seq. namely, to assure the insurability of licensed real estate personnel (See fn. 3 of the Appellate Court opinion at APP. A9). This gratuitous explanation makes the purpose of Civil Code §2079 et seq., even more suspect.

Under the Insurance Code sections concurrently passed

by the Legislature (Insurance Code section 11589.5) FRAUD is exempted from the list of insurable acts or events which the insurance companies are required to cover (See discussion by appellate court at APP. A13).

Apparently the Legislative concern put forth does not extend to protecting the public from real estate licensee fraud since it does not require insurance coverage for the benefit of the public.. Even the statement of the exception for fraud makes no sense since fraud has always been an exception to insurable acts or events.

The silence of the statute makes it void for vagueness and its failure to define its prohibitions makes it a trap for the innocent *Heilman v. Levi* (1975) 391 F.Supp 1106, affirmed 583 F.2d 373, certiorari denied 440 US 959. It is established that a statute must employ terms such that men of common intelligence need not guess at its meaning and differ in its application *Wotton v. Bush* (1953) 41 C.2d 460 citing *Connally v. General Construction Co.* 269 US 385, 391. A noncriminal statute is unconstitutionally vague and indefinite when its rule or standard is so vague and indefinite as to be no rule or standard *Horn v. Burns and Roe* (1976) 536 F.Supp. 688.

The ruling of the Appellate Court that the two year limitation of §2079 applies to a broker's fraud arising out of transaction involving real property covered by that statute creates a trap for even the most diligent buyer or prospective buyer. The three-year term of Code of Civil Procedure section 338 (d) had always been the measure of time for actionable fraud in real estate transactions. *West v. Henderson* (1991) 227 Cal.App.3rd 1578; *Nelson*

v. Nevel (1984) 154 C.A.3rd 132, A study of Section 2079 and its legislative history gives no indication that the Legislature intended to include fraud within the purview of the statute. The Legislature never hinted, much less told the public; "If you are damaged by a real estate licensee's fraud you will have no recourse unless you discover the fraud and file an action thereon within two years after you take possession of the property."

Loken is a case of first impression. There were no guidelines, no "red flags" to warn the innocent home buyer. There were no cases construing Section 2079. Instead a Caligulan posting of Section 2079 only told the diligent home buyer that action on a real estate licensee's innocent breach of duty must be begun within two years of taking possession of the residence.

By failing to state the hidden intent of the statute, the Legislature, if ever the hidden were its intent, created the means to deny a citizen substantive due process in violation of the Fourteenth Amendment of the U. S. Constitution.

The Appellate Court, by reading into §2079 the imagined unspoken intent of the legislature to create a new statute of limitations for real estate licensee fraud, has likewise acted to deprive Loken of substantive due process in violation of the Fourteenth Amendment of the U. S. Constitution.

II. This court should resolve the conflict between the statute enacted by the California Legislature and the provisions of the Fourteenth Amendment to the U. S. Consti-

tution so as to afford equal protection to the citizens of California.

California Civil Code section 2079 et seq., appears to create a special class of real estate licensees APP., *infra,* A9, fn 3, and also of "aggrieved members of the public" at the same time *Ibid.* Ostensibly, as discussed in footnote 3, the "aggrieved public " should benefit since that is the label the Legislature applied to §2079. The difficulty, though, is determining how the "aggrieved public" will benefit since the limitation on fraud has been reduced from three years from the discovery of the fraud to two years from possession of purchased residence, an apparent infinite loss but which practically could be as much as ten years AND the "aggrieved public" has not benefited from an insurance standpoint.

While the legislature attempted to label the statute, it cannot avoid the protection of the Fourteenth Amendment by merely applying a label. *Giaccio v. State of Pennsylvania* (1966) 382 U.S. 399.

Further, there must be an acceptable classification, something that is missing here. If, *arguendo,* the "aggrieved public" is established as the class then the statute is unreasonable, arbitrary or capricious in depriving the home buying public of the general protection of Code of Civil Procedure Section 338(d). If the other is true and the real estate licensee is the class then the language of the legislative history denies the same. The real estate licensee, who has been given the advantage of insurance and a short limitation of action, is ignored and the prospective purchaser of a residence is named by the history as the beneficiary of the statute. (See APP. *Infra,* A-9, fn 3.)

III. This court should find the statute unconstitutional as conflicting with provisions of the California constitution as well as being in violation of the Fourteenth Amendment.

In its attempt to validate the application of Civil Code Section 2079.4, the Appellate Court stated rules of statutory construction which favored the special aspect of §2079.4 over the general aspect of Code of Civil Procedure Section 338 (d) APP. *infra,* A15, citing *Malloy v. Municipal Court* (1968) 266 Cal.App2d 414. That citation is contrary to Article IV, Section 16 of the California Constitution which provides:

a) All laws of a general nature have uniform operation.

b) A local or special statute is invalid in any case if a general statute can be made applicable.

A constitutional construction of Civil Code 2079.4 in relation to Code of Civil Procedure Section 338(d) would have the general statute with its three-year limitation prevail.

CONCLUSION

Because of the importance of the questions presented, and for all the reasons stated, Bruce A. Loken's Petition for a Writ of Certiorari to the California Court of Appeals, Fourth Appellate District, Division One should be granted.

Respectfully submitted,

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CALIFORNIA COURT OF APPEALS
FOURTH DISTRICT, DIVISION ONE

Bruce A. Loken, Respondent	)	Case No. D017105
	)	
v.	)	OPINION
	)	FILED June 28, 1995
Century 21-Award Properties, Appellant	)	

HALLER, J. This appeal stems from the purchase of a single family residence by Bruce A. Loken in 1987. After discovering a crack in the cement slab of the building in 1990, Loken brought this action against various individuals and real estate brokerages involved in the sales transaction, including the seller's real estate brokerage and agent, Century 21-Award Properties and Jim E. Carmichael. The trial court, sitting without jury, found Century 21-Award Properties and Carmichael liable for negligent misrepresentation and per se violation of Civil Code[1] section 1102.2; the remaining defendants were found liable on these and other theories. The trial court found all defendants jointly and severally liable to Loken for damages of $78,500. The trial court also ruled all defendants jointly and severally liable for Loken's attorney fees of $52,040; as to Century 21-Award

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[1] All statutory references are to the Civil Code unless otherwise specified.

Properties and Carmichael, liability for Loken's attorney fees was premised on the "Tort of Another" doctrine. The trial court ruled neither Century 21-Award Properties and Carmichael nor any other defendant could recover on cross complaints for indemnity.

Century 21-Award Properties and Carmichael (collectively, Appellants) appeal. Appellants' main contentions are (1) the negligent misrepresentation cause of action was time barred and was not supported by substantial evidence, and (2) the trial court, which had granted a nonsuit on the per se violation of section 1102, erred in reversing itself on this point at the end of trial.

We reverse, finding negligent misrepresentation and per se violation of section 1102 causes of action were time barred.

Facts

On October 18, 1987, Loken viewed the exterior of the single-family residence for sale at 2080 Noble Street in Lemon Grove; at this viewing, Loken's real estate agent, Kenneth Harring, assured him that the patched cracks on the outside walls were normal for stucco. On the same day, Loken made a written offer to purchase the residence for $109, 000. Loken accompanied Harring and his wife, Rosemarie, also a real estate agent, as they delivered the written offer to the seller's agent,

Carmichael, in the parking lot of the Century 21-Award office. Kenneth Harring introduced Loken to Carmichael and told Carmichael that Loken was concerned that any residence he purchase be structurally sound and not have a defective slab. Carmichael, citing his viewing of the property and a contractor's building inspection report, responded that there were no problems with the house and that it appeared to be in a very structurally sound condition. Loken testified he relied on these representations by Carmichael.

On October 19, 1987, Susan Virden, the owner of the residence, counter-offered, and Loken accepted. The counter-offer was that Loken's $1500 good faith deposit be released to her at the start of escrow.

On October 20, 1987, Loken, who was enlisted in the Navy and assigned to a submarine, left for one week sea operation. On October 30, 1987, while in San Diego, Loken received a copy of Virden's disclosure statement in which she stated she was aware of only one significant defect, namely cracks in the cement driveway. Among other things the disclosure statement included Carmichael's signature verifying he had made "a reasonably competent and diligent visual inspection of the accessible areas of the property" and had not found any other defects.

Loken was away from San Diego intermittently on sea operations until December 4, 1987,. Escrow closed on December 7, 1987. Before the close of escrow, Loken was

never afforded a walk through inspection of the house although the sales contract provided he was to have one "within 5 days of escrow." However, on December 5, 1987, Loken did visit the property at the invitation of Virden after telephoning her.

After Loken returned to San Diego on December 4, he and the Harrings reviewed Virden's disclosure statement. The disclosure statement referenced "an inspection report provided by general contractor." On December 6, 1987, the Harrings showed Loken an inspection report of Virden's property that was prepared by Gerald Kwiat of Quality Inspection Service. A cover letter to the inspection report stated "[this house was found to be structurally sound and showing no apparent signs of displacement."

Loken moved into the residence on December 7, 1987, and resided there with roommates until July 6, 1988. After a dispute with a roommate, Loken moved out on July 6, 1988, sealed up the windows with plywood and locked the doors. The residence remained sealed and locked up until January, 1989, when Loken moved back. During the time that Loken lived in the Noble Street residence, he spent virtually all his time on the ground level and upper floor, seldom visiting the floor that was below ground level and that had the cracked slab.

In late January, 1990, Loken discovered major

cracking in the stucco. On February 1, 1990, after lifting the wall-to-wall carpeting in a room on the lower level, Loken discovered a major crack in the cement slab of the house; carpet glue was in the crack. It was determined the crack in the slab occurred before the last placement of carpeting because carpet glue lines were visible on the padding below the carpeting.

On March 28, 1990, Loken filed this lawsuit.

Carmichael denied making any representations about the house in Loken's presence. Carmichael testified when he received the listing he performed an inspection of the property. Carmichael looked at the foundation while measuring the house on the exterior and did not recall seeing any cracks. This was the only inspection of the exterior of the residence performed by Carmichael, who also conducted two 4 hour open houses there. Carmichael was aware of the fact the inspection report was prepared by a friend of the seller.

The fact-finder viewed the house twice during the course of the 1991 trial. In its statement of decision, the trial court noted, among other things, that in addition to a significant crack in the slab in the family room floor, there were numerous in the stucco exterior walls, receding cement steps adjacent to the north wall of the structure,

a crack in the concrete under the sliding glass patio door,[2] cracks in the cement foundation of the structure , cracks and warping in the sidewalk surrounding the structure and cracks in the interior walls and ceiling.

Discussion

I. Negligent Misrepresentation

(1) Appellants contend the negligent misrepresentations cause of action against them was time barred. We agree.

As framed by the parties, the issue is whether the statute of limitations for this cause of action is two years as set forth in section 2079.4 for actions stemming from the breach of as real estate broker's duty to prospective purchasers, or three years as set forth in the Code of Civil Procedure section 338, subdivision (d), applies because in this state negligent misrepresentation is considered a species of fraud or deceit involving a false assertion. (See Wilson v. Century 21 Great Western Realty (1993) 15 Cal.App.4th 298, 306 [18Cal.Rptr.2d 779]; see also Gagne v. Bertran (1954) 43 Cal.2d 481, 487-489 [275 P.2d 15] §§1710, subd.2, 1572, subd.2.)

Loken stated his fourth cause of action for negligent misrepresentation against all defendants, including

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[2] There was photographic evidence that at the time of the sale an iron bar was being used to support the patio door.

Appellants. It alleged in pertinent part:

> "34. On or about October 18, 1987, and at all times thereafter, Defendants, and each of them, represented to Plaintiff that SUBJECT PROPERTY was free and clear of any defect.... These representations made by Defendants, and each of them, to plaintiff were in fact false. The true facts are that SUBJECT PROPERTY had huge cracks in its slab floors....
>
> "35. Plaintiff is informed and believes and thereupon alleges that defendants, and each of them, made these representations without reasonable ground for believing that there were no cracks in SUBJECT PROPERTY's slab floors....Defendants, and each of them, knew that they could not accurately make such representations as they made and as are herein alleged. At all times herein relevant Defendants, and each of them, concealed from Plaintiff their lack of information and consequent inability to accurately make those representations.
>
> "36. Defendants, and each of them, had a duty to investigate the truth of their representations before making them to plaintiff. In not investigating the truth of their representations, they breached their duty to Plaintiff.

"37. Failure to make a complete and truthful disclosure in writing on [disclosure statement] is a violation of California statute and negligence *per se.*

"38. Plaintiff, at the time these misrepresentations were made by Defendants, and each of them, and at the time Plaintiff actually purchased SUBJECT PROPERTY, and for some time thereafter, was ignorant of the falsity of the Defendants, and each of them[], representations and believed them to be true. Had Plaintiff realized that SUBJECT PROPERTY's slab was cracked....Plaintiff would not have purchased SUBJECT PROPERTY. Plaintiff's reliance upon the representations of defendants, and each of them, was justified because Defendants were owners and inspectors, brokers and real estate agents of SUBJECT PROPERTY and had superior knowledge to that of Plaintiff.

The gravamen of this cause of action against Appellants was that it was unreasonable for Carmichael to represent the residence was structurally sound because Carmichael, who had the duty to inspect the property and disclose its defects, should have recognized "red flags" (See *Easton v. Strassburger* (1984) 152 Cal.App.3d 90, 104 [199 Cal.Rptr.383, 46 A.L.R. 4th 521] *(Easton)* indicating the structural soundness was suspect when he

inspected the property.

A broker's duty to inspect and disclose was first pronounced in *Easton,* [T]he duty of a real estate broker, representing the seller, to disclose facts....includes the affirmative duty to conduct a reasonably competent and diligent visual inspection of the residential property listed for sale and to disclose to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal.... (§2079 subd.(a).)[3]

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[3]Section 2079 et seq. Was enacted in 1985.(Stats.1985, ch 223, §2, pp.1221-1222.) In its accompanying statement of legislative intent, the Legislature declared: "It is the intent of the Legislature that this act codify and make precise the holding in Eaton v. Strassburger (152 Cal.App.3d 90). The legislature finds that the imprecision of terms in the Eaton case and the absence of a comprehensive declaration of duties, standards, and exceptions has caused insurers to modify professional liability coverage of real estate licensees and has caused confusion among real estate licensees as to the manner of performing the duty ascribed to them by the court, and that it is necessary to resolve and make precise these issues in an expeditious manner. The Legislature finds that it is desirable to facilitate the issuance of professional liability insurance as a resource for aggrieved members of the public, and declares that the provisions of this act are, and shall be interpreted as, a definition of the duty of care found to exist by Eaton v. Strassburger, and the manner of its discharge." (Stats. 1985, ch. 223 §4, pp. 1222-1223.)

Given this codification of *Easton* and the concomitant duties imposed upon real estate brokers and salespersons, it becomes clear that, as to Appellants, Loken's fourth cause of action for "negligent misrepresentation" is based on Carmichael's alleged breach of those statutory duties.

Section 2079.4 provides for a two year statute of limitations for breach of the broker's or salesperson's duty to inspect and disclose under section 2079 and related statutes. Section 2079.4 reads: "In no event shall the time for commencement of legal action for breach of duty imposed by this article exceed two years from the date of possession, which means the date of recordation, the date of close of escrow, or the date of occupancy, which ever occurs first."

Appellants urge us to apply the two-year limitation period of section 2079.4 for the negligent misrepresentation cause of action. Here, where the negligent misrepresentation cause of action arises out of Carmichael's duty to inspect and disclose under 2079, we deem it appropriate to do so.

Statutory interpretation is a question of law; accordingly we interpret section 2079.4 de novo. (*Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 9 [28 Cal.Rptr.2d 133].) The fundamental rules of statutory construction are well settled: "First, 'the court should ascertain the intent of the Legislature so as to

effectuate the purpose of the law.' [Citations.] Secondly, the provision must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity. [Citations.] Significance, if possible, should be attributed to every word, phrase, sentence and part of an act in pursuance of the legislative purpose, as 'the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the content of the statutory framework as a whole.' [Citation.] ' "The court shall take into account matters such as context, the object in view, the evils to be remedied, the history of the times and of legislation on the same subject, public policy, and contemporaneous construction." ' [Citations.] (*DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 17-18 [194 Cal.Rptr. 722].)

To determine intent, we first look to statutory language, giving effect to the plain meaning of the language. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562 [7 Cal.Rptr.2d 531, 828 P.2d 672].)

In enacting section 2079.4, the Legislature established a two year limitation period for "legal action[s] for breach of the duty imposed by [section 2079]." (§2079.4.) Thus, in resolving the issue presented here, it is important to understand the character of the duty

defined in section 2079, recited above. Significantly, the statute imposes a two pronged duty on the broker: first to conduct a reasonably competent and diligent visual inspection; and, second, to disclose all material facts such an inspection would reveal.

The dual nature of this duty does not sound exclusively in negligence. While the first prong of the obligation (inspection) embodies traditional negligence concepts, breach of the second prong (disclosure of material facts) encompasses actionable conduct associated with both negligence and negligent misrepresentation. It follows therefore, under a plain meaning construction of section 2079.4, that negligence *and* negligent misrepresentation causes of action fall within the two year statute of limitations.

Contrary to Loken's argument, the Legislature did not intend to restrict section 2079.4 to negligence actions. Had the Legislature intended to so limit 2079.4, it easily could have done so in reasonably clear language. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 724 [257 Cal.Rptr. 708, 771 P.2d 406].) Instead it chose not to do so.

The Legislatures intent is further evidenced in the statement of legislative intent. (See fn. 3, *ante*.) One of the explicit motivating factors for the Legislature in enacting this legislation was to facilitate the issuance of

professional liability insurance for real estate licensees. (Stats. 1985, ch. 223, §4, pp. 1222-1223.) Once the *Easton* opinion was issued, the Legislature acted quickly to clarify the law and assure that liability insurers provide coverage for duties defined in section 2079.

Moreover, as part of this legislation, the Legislature enacted Insurance Code section 11589.5, which underscores the intent to promote availability of liability insurance for real estate licensees. (Stats. 1985, ch.223, §3, p.1222.) Under Insurance Code section 11589.5, insurers that provide malpractice insurance for real estate licensees cannot exclude from coverage liability stemming from the breach of duty arising under section 2079 et seq., but can exclude from coverage liability stemming from "a dishonest, fraudulent, criminal, or malicious act, error or omission committed by, at the direction of, or with the knowledge of the insured." Thus, in the same legislation, the Legislature acted to ensure coverage for a licensee's liability stemming from their duties under section 2079, but not for fraudulent or criminal acts of the licensee.

We are cognizant, of course, that California law generally views "negligent misrepresentation" as a species of fraud or deceit (see generally 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §720 et seq., p. 819 et seq.). In light of this, Loken urges that the three-year statute of limitations set forth in Code of Civil Procedure

section 388, subdivision (d), for actions sounding in fraud should be controlling. Here, however, the fact that Loken has labeled his fourth cause of action against Appellants as sounding in negligent misrepresentation is not crucial because the wrongful conduct he alleged against Appellants stemmed from statutory duties imposed upon real estate brokers and salespersons by section 2079.

The Legislature has in plain language enacted a two year statute of limitations for "legal action(s) for the breach of a duty imposed by [section 2079]." (§2079.4.) In so doing, the Legislature chose to impose a specific statute for actions derived from the breach of section 2079 duties rather than rely on a general catch-all statute of limitations provision. "It is ... an established rule of statutory construction that particular provisions will prevail over general provisions." (*In re James M.* (1973) 9 Cal.3rd 517, 522 [108 Cal.Rptr. 89, 510 P.2d 33].) Further, "the Legislature is presumed to be aware not only of the general laws which it has enacted ....but also of the judicial decisions interpreting those laws...." (*Maloy v. Municipal Court* (1968) 266 Cal.App,2d 414, 418 [72 Cal.Rptr. 207], fn. Omitted.)

Thus, where the Legislature has provided for a two-year limitation period for actions stemming from the breach of duty imposed by section 2079, this specific fraud statute prevails over the general statute of limit-

ations of three-years for fraud and negligent misrepresentation causes of action of Code of Civil Procedure section 338, subdivision (d). (*Maloy v. Municipal Court, supra,* 266 Cal.App.2d at p. 418 ["Where...two inconsistent statutes , one general and the other special, cover the same subject matter, the special one, whether or not enacted first, is treated as an exception to the general statute and controls unless an intent to the contrary clearly appears."].)

In sum, where the negligent misrepresentation cause of action is derived from the duty to inspect and disclose under section 2079, there can be no question that it falls within the two-year limitation period of section 2079.4.[4]

II. *Per se Violation of Section 1102*

Appellants mount a two pronged attack on the judgment against them on Loken's cause of action

---

[4]Accordingly, it is unnecessary for us to discuss Appellants' other complaints about the negligent misrepresentation cause of action, namely that there was no substantial evidence to support their liability on this cause of action and they were prejudiced by an initial ruling by the trial court in their favor and a later reversal of this ruling. Whether Appellants were prejudiced by the trial court's reversal at the end of the trial of its judgment on the section 102 cause of action is another matter, which we shall address in part II, *post.*

alleging per se violation of section 1102 et seq.[5]

On August 6, 1991, the trial court ruled that judgment pursuant to Code of Civil Procedure section 631.8 would be granted in favor of Appellants on Loken's sixth cause of action for per se violation of section 1102. However, the court did not issue a written order of dismissal as required by Code of Civil Procedure section 581, subdivision (d); the record before us includes only an entry in the court's minutes of that day. After the close of evidence and without giving notice, the trial court reversed itself and found Appellants liable on this cause of action.

---

[5]Section 1102 et seq. Requires certain disclosures be made when residential property is transferred. Section 1102.6 sets forth the "REAL ESTATE TRANSFER DISCLOSURE STATEMENT." A section of the disclosure statement is to be filled out by the seller's agent. This section reads as follows:

"THE UNDERSIGNED, BASED ON THE ABOVE INQUIRY OF THE SELLER(S)AS AS TO THE CONDITION OF THE PROPERTY AND BASED ON A REASONABLY COMPETENT AND DILIGENT VISUAL INSPECTION OF THE ACCESSIBLE AREAS OF THE PROPERTY IN CONJUNCTION WITH THAT INQUIRY, STATES THE FOLLOWING;

- Agent notes no items for disclosure.
- Agent notes the following items:

"_____

"_____

"_____

(§1102.6)

First the trial court's reversal of itself was erroneous on substantive grounds. The trial court was legally correct when it granted judgment pursuant to Code of Civil Procedure section 631.8 because the cause of action alleging per se violation of section 1102 was time barred. This cause of action sounded in negligence (see fn. 5, *ante*), and, stemmed from the duty imposed on Carmichael under section 2079. Clearly, therefore, the cause of action was governed by the two-year statute of limitations of section 2079.[6]

We also agree with Appellants that they were irrevocably prejudiced. The effect of this judicial change of heart was to deprive appellants of an opportunity to defend themselves. It was reasonable for Appellants to rely on the court's statement it was granting judgment and therefore conclude it was unnecessary to present any evidence on a cause of action that had been dismissed. Under these circumstances, the court's reversal of itself after the close of evidence was tantamount to a miscarriage of justice. Loken's waiver argument was unpersuasive.

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[6] In light of our conclusion that the two-year statute of limitations of section 2079.4 bars this cause of action, as well as the negligent misrepresentation cause of action, Appellants remaining assignments of error are moot.

Disposition

Judgment against Appellants is reversed in its entirety.

Work, Acting P.J., and Froelich, J., concurred.

Fourth Appellate District, Division One, No. D017105
SO48061

IN THE SUPREME COURT OF CALIFORNIA

BRUCE A. LOKEN,
Respondent

v.

CENTURY 21-AWARD PROPERTIES Et Al.,
Appellants

FILED
SEP 21 1995
Robert Wandruff, Clerk
Deputy

Petition for review DENIED

The requests for an order directing depublication of the opinion are denied.

Werdegar

Acting Chief Justice

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO
EL CAJON JUDICIAL DISTRICT

BRUCE A. LOKEN, Plaintiff	)	NO. EC002156
	)	
vs.	)	
	)	
SUSAN M. VIRDEN, GERALD L. KWIAT, CENTURY 21-AWARD PROPERTIES, JIM E. CARMICHAEL, MILITARY PROPERTIES, KENNETH ROSEMARIE HARRING, and DOES 1 through 12, Defendants	)	JUDGMENT AFTER TRIAL BY COURT
ASSOCIATED CROSS ACTION	)	

THE ABOVE ENTITLED MATTER CAME ON REGULARLY FOR TRIAL on July 17, 1991, before the Honorable Victor E. Bianchini, Judge, sitting without a jury, a jury having been duly waived. Plaintiff BRUCE A. LOKEN was represented by SEYMOUR J. ROSE and was personally present. Defendants SUSAN M. VIRDEN AND GERALD L. KWIAT were represented by DOUGLAS A. GLASS and were personally present except for those times either chose to be absent and waived his or her right to attendance for those times. CENTURY 21-AWARD PROPERTIES and JIM E. CARMICHAEL were represented by RICHARD C. WILDMAN, JR. and were personally present except for those times JIM E. CARMICHAEL chose to be absent

and waived his right to attendance for those times. KENNETH HARRING was not represented by counsel and because of illness was not present. By a written stipulation made a part of the record herein, KENNETH HARRING waived his right to be represented, waived his right to attend and agreed to be bound by any decision the court might hand down for or against ROSEMARIE HARRING as though the same were handed down against KENNETH HARRING and MILITARY PROPERTIES, the name under which defendant KENNETH HARRING conducted his real estate business. Defendant ROSEMARIE HARRING appeared *in propria persona* and as an owner of MILITARY PROPERTIES and was personally present except for those times she chose to be absent and waived her right to attendance for those times.

The Court having heard and considered the oral, documentary and demonstrative evidence submitted by each party, having viewed the premises of 2080 Noble Street, the subject of this litigation, the cause having been argued and submitted for decision and the Court having caused to be made and filed herein its written STATEMENT OF DECISION,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. All defendants, jointly and severally, shall pay to plaintiff BRUCE A. LOKEN the sum of $78,500.00, said sum being the principal amount of his damages;

2. All defendants, jointly and severally, shall pay to plaintiff BRUCE A. LOKEN, as his attorney fees incurred in this matter, the sum of $52,000.00 so set forth in plaintiffs MEMORANDUM OF COSTS;

3. Defendants VIRDEN and KWIAT, jointly and

severally, shall pay to plaintiff BRUCE A. LOKEN the sum of $1,974.00, said sum being that portion of costs incurred by LOKEN in this matter which is attributable to them:

4. Defendants CENTURY 21-AWARD PROPERTIES and JIM E. CARMICHAEL, jointly and severally, shall pay to plaintiff BRUCE A. LOKEN the sum of $790.11, said sum being that portion of the cost incurred by LOKEN in this matter which is attributable to them;

5. Defendants MILITARY PROPERTIES, K. HARRING AND R. HARRING, jointly and severally, shall pay to plaintiff BRUCE A. LOKEN the sum of $1,168.80, said sum being that portion of the cost incurred by LOKEN in this matter which is attributable to them;

6. Defendant SUSAN M. VIRDEN shall pay to plaintiff BRUCE A. LOKEN the sum of $5000.00, as exemplary damages;

7. Defendant GERALD L. KWIAT shall pay to plaintiff BRUCE A. LOKEN the sum of $2,000.00, as exemplary damages;

8. This award, including direct damages, exemplary damages, costs and attorney fees, shall bear interest at the legal rate from the date of entry of this judgment to the date when the award shall have been paid in full,

10. No party shall take judgment on his/her/its cross complaint.

Dated: March 20, 1992

VICTOR E. BIANCHINI
Judge

Supreme Court, U.S.
FILED
DEC 26 1995
CLERK

No. 95-811

In The

Supreme Court of the United States

October Term, 1995

BRUCE A. LOKEN,

Petitioner,

vs.

CENTURY 21-AWARD PROPERTIES AND JAMES E. CARMICHAEL,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeals, Fourth Appellate District, Division One

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the questions presented by Loken's Petition for a Writ of Certiorari were raised and decided by the state trial, appellate and/or supreme courts.

2. Whether the state courts' rulings submitted for review in Loken's Petition for Writ of Certiorari were based on independent state grounds.

3. Whether the questions presented by Loken's Petition for Writ of Certiorari were the subject of a final judgment or decree by the highest court of the State of California.

4. If the Court determines that it has jurisdiction, whether the legislative enactment of a specific statute of limitation as to real estate professionals violates federal substantive due process and equal protection under the United States Constitution.

STATEMENT OF INTERESTED PARTIES

Century 21-Award Properties is a d/b/a for L.M. Osburn Real Estate Corporation. L.M. Osburn Real Estate Corporation is not a parent corporation, and there are no subsidiary corporations. None of the corporations are publicly held.

James E. Carmichael is an individual.

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II. Loken's Petition should be denied because the California courts' rulings were based on independent state grounds and thus, pursuant to 28 U.S.C. § 1257(a), this Court lacks jurisdiction to accept this Petition for Writ of Certiorari.	8

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III. The question of the applicability of the statute of limitations found at California Civil Code § 2079.4 to a cause of action for fraud was not presented to or reviewed by the state court of appeals or the California Supreme Court. Thus, this Court has no jurisdiction over this matter in that there is no final judgment or decree as required by 28 U.S.C. § 1257(a). 9

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TABLE OF CITATIONS

Cases Cited:

Gagne v. Bertram, 43 Cal. 2d 481 (1954) 10

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California Civil Code § 2079.4 ..... 1, 2, 3, 5, 7, 8, 9, 10, 11

28 U.S.C. § 1257(a) 1, 6, 8, 9, 11

United States Constitution Cited:

Fifth Amendment 5, 8

Fourteenth Amendment 5, 8

Rule Cited:

Supreme Court Rule 14 ..... 6, 7

Other Authorities Cited:

BAJI 12.31 (8th Ed.), 5th Witkin, *Summary of California Law*, § 675 (9th Ed.) 10

BAJI 12.45 (8th Ed.), 5th Witkin, *Summary of California Law*, § 720 (9th Ed.) 10

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APPENDIX

Appendix A — Table of Contents of Respondent's Brief in the Court of Appeal, State of California, Fourth Appellate District 1a

Appendix B — Excerpts of Petitioner's Petition for Review in the Supreme Court of California 12a

TO THE HONORABLE SUPREME COURT:

The Respondents, James E. Carmichael and Century 21-Award Properties, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner Bruce A. Loken.

STATEMENT OF JURISDICTION

Petitioner attempts to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a). Respondents respectfully object to the jurisdiction of this Court for the following reasons.

1. The question of the applicability of the statute of limitations found at California Civil Code § 2079.4 as it pertains to a cause of action for fraud has not been reviewed by the highest court of the state, and thus there is no final judgment or decree pertaining to said issue.

2. This Court does not have jurisdiction to hear the claims presented in Loken's Petition for a Writ of Certiorari because said claims were not raised by Petitioner in the state court proceedings.

3. This Court does not have jurisdiction to hear the claims presented in Loken's Petition for Writ of Certiorari because the State of California has not considered and/or ruled on the federal questions presented therein.

4. Petitioner has failed to identify when, and by what method, the federal questions presented to this Court were presented to the state trial, appellate, and supreme courts.

STATEMENT OF CASE

A. Proceedings in State Courts

This Petition arises from the purchase of a single-family residence by Bruce A. Loken (Petitioner) in 1987. After discovering a crack in the cement slab of the single-family residence in 1990, Loken brought an action against various individuals and real estate brokerages involved in the sale of the residence. These defendants included the seller's real estate brokerage and agent, Century 21-Award Properties and James E. Carmichael (hereinafter collectively Carmichael). The trial court, sitting without jury, found Carmichael liable for negligent misrepresentation and per se violation of California Civil Code § 1102; the remaining defendants were found liable on these and other theories.

The trial court found all defendants jointly and severally liable to Petitioner for damages of $78,500. The trial court also ruled that all defendants were jointly and severally liable for Loken's attorneys fees of $52,040. As to Carmichael, liability for Loken's attorneys fees was premised on the "Tort of Another" doctrine.

Carmichael appealed that verdict. In their appeal, Carmichael's primary contentions were that: (1) the negligent misrepresentation cause of action was barred by the statute of limitations found in California Civil Code § 2079.4 and was not supported by substantial evidence; and (2) the trial court, which had granted a non-suit on the per se violation of California Civil Code § 1102, erred in reversing itself on this point at the end of trial.

The Court of Appeals for the State of California, Fourth Appellate District, Division One, reversed the trial court ruling,

finding that negligent misrepresentation and the per se violation of California Civil Code § 1102 were barred by the statute of limitations as prescribed in California Civil Code § 2079.4. Loken filed a Petition for Review to the Supreme Court of the State of California. On September 21, 1995, that Petition was denied.

During the trial of this matter, Loken made no claim that the application of the statute of limitations found at California Civil Code § 2079.4 was arbitrary, capricious and unreasonable in violation of federal substantive due process or equal protection under the Fifth and Fourteenth Amendments to the United States Constitution. Similarly, said claim was not presented and/or ruled upon by either intermediate state appellate court or California Supreme Court.

B. Factual Background

On October 19, 1987, Loken viewed the exterior of the single-family residence which is the subject of the underlying litigation. During this review, Loken's real estate agent, Kenneth Harring, assured him that the patched cracks on the outside wall were normal for stucco. On the same day, Loken made a written offer to purchase the residence for $109,000. Loken accompanied Harring and his wife Rosemary, also a real estate agent, as they delivered the offer to the seller's agent (Carmichael). Harring introduced Loken to Carmichael and allegedly told Carmichael that Loken was concerned that any residence he purchased be structurally sound and not have a defective slab. Carmichael, citing his viewing of the property and a contractor's building inspection report, allegedly responded that there were no problems with the house and that it appeared to be in a structurally sound condition. Loken testified he relied on these representations by Carmichael.

On October 19, 1987, Susan Virden, the owner of the residence in question, counter-offered and Loken accepted. The counter-offer required that Loken's $1,500 good faith deposit be released to Virden when escrow opened. On October 20, 1987, Loken, who was enlisted in the Navy and assigned to a submarine, left for one week of sea operations. On October 30, 1987, while in San Diego, Loken (pursuant to California Civil Code § 1102 *et seq.*) received a copy of Virden's disclosure statement in which she stated she was aware of only one significant defect; namely, cracks in the cement driveway. Among other things, the disclosure statement included Carmichael's signature verifying that he had made a reasonably competent and diligent visual inspection of the accessible areas of the property and had not found any other defects.

Loken was away from San Diego intermittently on operations until December of 1987. Escrow closed on December 7, 1987. Before the close of escrow, Loken allegedly was never offered a walk-through inspection of the house although the sales contract provided that he was to have one within five days of the opening of escrow. However, on December 5, 1987, Loken did visit the property at the invitation of the seller (Virden).

After Loken returned to San Diego on December 4, 1987, he and Harring viewed Virden's disclosure statement. The disclosure statement referenced an inspection report provided by a general contractor. On December 6, 1987, the Harrings showed Loken an inspection report from the Virden property that was prepared by Gerald Kwiat of Quality Inspection Service. A cover letter to the inspection report stated "this house was found to be structurally sound and showing no apparent signs of displacement."

Loken moved into the residence on December 7, 1987 and resided there with roommates until July 6, 1988. After a dispute

with a roommate, Loken moved out on July 6, 1988, sealed up the windows with plywood and locked the doors. The residence remained sealed and locked until July of 1989 when Loken moved back into the residence. During the time that Loken lived in the residence in question, he allegedly spent virtually all of his time on the ground level and upper floors, seldom visiting the floor that was below ground level and that had a cracked slab.

In late January 1990, Loken discovered cracking in the stucco. On February 1, 1990, after lifting the wall-to-wall carpeting in a room on the lower level, Loken discovered a crack in the concrete slab of the house.

On March 28, 1990, Loken filed the lawsuit which is the subject of this Petition.

SUMMARY OF ARGUMENT

The California Courts in this case did not decide the question of whether the application of California Civil Code § 2079.4 (the two-year statute of limitations for real estate agents) violates the Fifth and Fourteenth Amendments to the United States Constitution. This argument was never presented by Loken to the state trial, appellate, or supreme courts. Thus, the Fourth District's decision and the California Supreme Court's review of that decision were based on independent state grounds.

Additionally, the question presented in Loken's Petition for Writ of Certiorari (the applicability of California Civil Code § 2079.4 to a fraud cause of action) was not raised to or decided by the state court in the underlying matter. The question presented to that court dealt with a finding of negligent misrepresentation, not fraud.

For all of the reasons cited above, it is Respondents' position

that pursuant to 28 U.S.C. § 1257(a) this Court lacks jurisdiction over this matter and this Petition should be denied.

REASONS FOR DENYING THE WRIT

I.

LOKEN'S PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE HE FAILED TO RAISE THE CONSTITUTIONAL ISSUES POSED TO THIS COURT TO THE STATE TRIAL, APPELLATE, OR SUPREME COURTS.

Rules of the Supreme Court of the United States, Rule 14, requires that:

> 1. A Petition for Writ of Certiorari shall contain, in the order indicated:
>
> * * *
>
> (g) A concise statement of the case setting out the facts material to consideration of the questions presented, and also containing the following:
>
> (i) If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent

> quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . ., so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. . . .

Rules of the Supreme Court of the United States, Rule 14, paragraph 1(g)(i).

Loken's Petition for Writ of Certiorari contains no references which would comply to the Rule outlined above. Petitioner herein at no point during the trial of this case, or at the Appellate Court, or in his Petition to the California Supreme Court, made reference to the concept that the application of California Civil Code § 2079.4 was in any way violative of Mr. Loken's due process or equal protection rights under either the California or United States Constitutions. It has been consistently held that the United States Supreme Court is without jurisdiction to hear federal issues where the federal claim had not been raised and ruled on in the underlying state court proceedings. *Illinois v. Gates*, 462 U.S. 213, 221-223, 76 L. Ed. 2d 527, 537-539, 103 S. Ct. 2317 (1983); *Webb v. Webb*, 45 U.S. 493, 496-497, 68 L. Ed. 2d 392, 397, 101 S. Ct. 1889 (1981); *Monks v. New Jersey*, 389 U.S. 71, 26 L. Ed. 2d 54, 55, 90 S. Ct. 1563 (1990).

As the Court can see from pertinent portions of Loken's response to Carmichael's appeal at the appellate court (Respondents' App. A, 1-11) and pertinent portions of his Petition for Review at the California Supreme Court (Respondents' App. B, 1-6), the question of the constitutionality of California Civil Code § 2079.4 was never presented to the state courts.

It is therefore submitted that on this basis alone Loken's Petition for Certiorari should be denied.

II.

LOKEN'S PETITION SHOULD BE DENIED BECAUSE THE CALIFORNIA COURTS' RULINGS WERE BASED ON INDEPENDENT STATE GROUNDS AND THUS, PURSUANT TO 28 U.S.C. § 1257(a), THIS COURT LACKS JURISDICTION TO ACCEPT THIS PETITION FOR WRIT OF CERTIORARI.

In order for this Court to assume jurisdiction over this matter, the underlying state court must have been presented with and decided a federal question. *Illinois v. Gates*, 462 U.S. 213, 221-223, 76 L. Ed. 2d 527, 537-539, 103 S. Ct. 2317 (1983); 28 U.S.C. § 1257(a). In order to satisfy this requirement, Loken would have had to have presented to the state courts the issue of whether the state courts' application of California Civil Code § 2079.4 was violative of the United States Constitution and specifically the Fifth and Fourteenth Amendments thereto. As this Court can see from the pertinent portions of Loken's response to Carmichael's appeal (Respondents' App. A, 1-11), the Fourth District's ruling thereon, reproduced in the appendix to Loken's Petition for Certiorari (Petitioner's App. A, 1-18), and pertinent portions of Loken's Petition for Review to the California Supreme Court (Respondents' App. B, 1-6), the question of the constitutionality of California Civil Code § 2079.4 was never presented to the California courts for their determination.

In light of the aforementioned, the only logical conclusion is that the Fourth District's ruling at the appellate court level and the California Supreme Court's review of said ruling were based on independent state grounds. A review of the appellate court's opinion, reproduced in the appendix to Loken's Petition for

Certiorari (Petitioner's App. A, 1-18), further supports the fact that the California state courts in the *Loken* matter did not rule on the question of whether California Civil Code § 2079.4 is violative of the United States Constitution.

Therefore, it is once again respectfully submitted that this Court lacks jurisdiction to accept Loken's Petition and said Petition must be denied.

III.

THE QUESTION OF THE APPLICABILITY OF THE STATUTE OF LIMITATIONS FOUND AT CALIFORNIA CIVIL CODE § 2079.4 TO A CAUSE OF ACTION FOR FRAUD WAS NOT PRESENTED TO OR REVIEWED BY THE STATE COURT OF APPEALS OR THE CALIFORNIA SUPREME COURT. THUS, THIS COURT HAS NO JURISDICTION OVER THIS MATTER IN THAT THERE IS NO FINAL JUDGMENT OR DECREE AS REQUIRED BY 28 U.S.C. § 1257(a).

Loken, in his Petition to this Court, has stated the Questions Presented as follows:

> Whether, in a case of first impression where a party has prevailed against a real estate licensee under a statute which specifically states that the limitation of actions for *fraud* is three years, it is it is [sic] arbitrary, capricious and unreasonable in violation of federal substantive due process [under Issue Two, equal protection] under the Fourteenth Amendment of the U.S. Constitution for the state to then enforce a statute which is silent as to a limitation on actions for *fraud* as

> establishing a two-year limitation on *fraud* for real estate licensees. [emphasis added]

The elements of intentional misrepresentation (or what is commonly referred to in California as fraud) and negligent misrepresentation are different. Negligent misrepresentation is not merely a lesser included form of intentional misrepresentation or fraud. The elements of fraud which give rise to a cause of action for intentional misrepresentation are (a) misrepresentation (false representation, concealment or nondisclosure); (b) knowledge of falsity (or scienter); (c) intent to defraud, *i.e.*, to induce reliance; (d) justifiable reliance; and (e) resulting damages. California Civil Code § 1709; *Seeger v. Odell*, 18 Cal. 2d 409, 414 (1941); BAJI 12.31 (8th Ed.), 5th Witkin, *Summary of California Law*, § 676 (9th Ed.).

Negligent misrepresentation, on the other hand, occurs where the defendant makes false statements, honestly believing that they are true, but without reasonable grounds for such belief. *Gagne v. Bertram*, 43 Cal. 2d 481, 487, 488 (1954); BAJI 12.45 (8th Ed.), 5th Witkin, *Summary of California Law*, § 720 (9th Ed.).

In coming to its decision in this matter, the Fourth District Court of Appeals held, "Appellants contend the *negligent misrepresentation* cause of action against them was time barred. We agree." *Loken v. Century 21 Award Properties*, 36 Cal. App. 4th 263, 268 (1995); reproduced in the appendix to Loken's Petition for Certiorari (Petitioner's App. A, 6) (emphasis added).

Later in the Decision, after discussing the applicability of California Civil Code § 2079.4 to a cause of action for negligent misrepresentation, the Appellate Court stated as follows: "In sum, where the *negligent misrepresentation* cause of action is derived from the duty to inspect and disclose under § 2079, there

can be no question that it falls within the two-year limitation period of section 2079.4." *Loken, supra,* at 273; reproduced in the appendix to Loken's Petition for Certiorari (Petitioner's App. A, 15) (emphasis added).

The question of if and under what circumstances a cause of action for fraud will be time barred by the two-year statute of limitations found at California Civil Code § 2079.4 was not decided by the underlying State Courts. Therefore, there has been no final decree or judgment by the highest court of the State of California as to the questions presented by Loken's Petition herein. Consequently, it is once again respectfully submitted that, pursuant to 28 U.S.C. § 1257(a), this Court should deny Loken's Petition for Writ of Certiorari.

CONCLUSION

Carmichael prays that this Court deny Loken's Petition for Writ of Certiorari because the case presents no issue appropriate for the Court's review and the Court lacks jurisdiction over the issues presented.

Respectfully submitted,

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STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

CIVIL NO. D017105

BRUCE A. LOKEN

Plaintiff and Respondent

v.

CENTURY 21-AWARD PROPERTIES

Defendants and Appellants

Appeal from the Superior Court of San Diego County
The Honorable Victor E. Bianchini, Judge

RESPONDENT'S BRIEF

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IN THE

SUPREME COURT OF CALIFORNIA

BRUCE A. LOKEN

Plaintiff and Appellant

vs.

CENTURY 21-AWARD PROPERTIES, et al

Defendant and Respondent

After A Decision By The Court of Appeal
Fourth Appellate District, Division One
(Case No. D017105)

PETITION FOR REVIEW

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IN THE

SUPREME COURT OF CALIFORNIA

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vs.

CENTURY 21-AWARD PROPERTIES, et al

Defendant and Respondent

After A Decision By The Court Of Appeal
Fourth Appellate District, Division One
(Case No. D017105)

PETITION FOR REVIEW

ISSUES PRESENTED

1. Whether, when a fraud has been perpetrated by a real estate licensee in the sale of a house, the two year limitation of Civil Code Section 2079.4, which is silent as to fraud, may supersede and replace the three year limitation of Code of Civil Procedure Section 338 subdivision (d) which is fraud specific.

2. Whether the limitation of Civil Code Section 2079.4, which, by its own language, applies only to Chapter 3. Article 2. may be extended to include Civil Code Section 1102 in Chapter 2. Article 1.5 (Civil Code Section 1102.)

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3. Whether Civil Code Section 2079 et seq, held to codify *Easton v. Strassburger* (1984) 152 Cal.App.3d 90 (*Easton*), a case which stands for protection of the home buyer, may be construed to limit and reduce the home buyer's rights against a fraudulent real estate licensee.

4. Whether inclusion of the Civil Code section 2079.4 limitation in a contract governing the purchase and sale of real property is, so far as it limits the rights of the public to commence legal actions for fraud, exculpatory and therefore against the policy of the law.

NATURE OF THE CASE AND PROCEDURAL HISTORY

A. The Underlying Claim

Plaintiff Loken purchased a single family residence in 1987, taking occupancy on December 7, 1987. The Seller provided Loken with a copy of her disclosure statement revealing that the only defect of the property was a crack in the concrete driveway. The broker Century 21-Award Properties, through its selling agent Jim Carmichael (Carmichael) verified the accuracy of that disclosure statement and stated, in writing, that he had conducted "a reasonably competent and diligent visual inspection of the accessible areas of the property" and had not found any other defects. Carmichael also assured Loken that there were no problems with the house and that it was structurally sound. Carmichael, aware of the relationship, presented Loken with an

. . .

* * *

Supreme Court, U.S.
FILED
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NO. 95-811

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

BRUCE A. LOKEN,
Petitioner

v.

CENTURY 21-AWARD PROPERTIES,
Respondent

On Petition for A Writ of Certiorari to the California Court of Appeals Fourth Appellate District, Division One

PETITIONER'S REPLY MEMORANDUM

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5 pp

Respondent, in its opposing brief in the present matter, misstates the law of California and distorts the facts . The misstatement of law is evident from the following attempted rewrite of the California Civil Code.

On page 10 of its Brief in Opposition, Respondent cites California Civil Code Section 1709 as providing the elements of intentional misrepresentation.

Civil Code Section 1709, in its entirety, states:

"**§1709. Deceit; damages**

Fraudulent Deceit. One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

What respondent fails to do is continue to the definition of negligent misrepresentation which is set forth in California Civil Code Section 1710.

"**§1710 Deceit defined**

A deceit within the meaning of the last section [1709] is either: ...

2. The assertion, as a fact, of that which is not true by one who has no reasonable ground for believing it to be true;"

Negligent misrepresentation is defined therefor, as a fraud (deceit) that may be unintentionally committed, as is held in the case Respondent misstates below, even absent scienter or the intent to deceive.

On the same page of his Brief in Opposition, Respondent intentionally distorts the holding in *Gagne v. Bertram,* 43 Cal.2d481, 487, 488 (1954) by stating that it stands for the proposition that negligent misrepresentation occurs where a defendant makes false statements honestly believing that they are true. At pages 2740-2741 in 4 Witkin Summary of California Law 8th Edition, §481, *Gagne* is explained as standing for the proposition that "scienter" or "the intent to deceive" is not a element of negligent misrepresentation and for the proposition that the belief of the defendant does not control if he "has no reasonable ground for believing it to be true". In the present case the trial court found respondent's fraud to be the representations it made without "reasonable ground for believing them true."

Respondent distorts and disregards the facts of this case. On page 9 of its Brief in Opposition Respondent argues that the issue of the statute of limitations of Civil Code Section 2079.4 was not presented to the state trial or appellate courts and therefore that issue lacks a final judgment or decree

necessary to give this court jurisdiction over the matter. Respondent ignores the fact that Loken, in his Brief to the Court of Appeals, cited seven pages of the trial court reporter's transcript which pages contain testimony and argument on that very issue. By disregarding the trial record and the appellate briefs, Respondent sets forth a claim which is entirely without basis in fact and is wrong in law.

Respondent similarly disregards facts and law to fault Appellant for not raising the issue of constitutionality of California Civil Code § 2079.4 in the state trial or appellate courts.

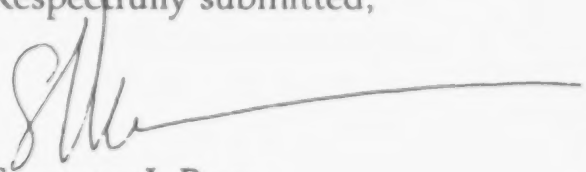
FACT: The statute as it stands poses no constitutional question. The trial court interpreted the statute correctly and found that it did not include fraud within its limitation. The state Court of Appeals created the conflict by erroneously holding that the statute did include fraud, notwithstanding the applicable specific fraud statutes contained in the California Civil Code and also notwithstanding that neither Section 2079 nor the legislature's stated intent nor the case which the section attempts to codify made any reference to or considered fraud. The error of the Court of Appeals decision created the constitutional conflict and that conflict was presented to the State Supreme Court in Loken's Petition for Review. Loken thereby obtained the judgment or decree of the highest court of the

state.

The transparent distortions of fact and the misstatements of law presented by Respondent show the lack of substance in its opposition and obviate the necessity of a full brief in response. However, should the Court wish Petitioner will be happy to provide additional instances and authorities to demonstrate the falsities contained in Respondent's brief.

These same distortions and misstatements only demonstrate the necessity for review of the action taken in the state courts. Petitioner suggests that reversal is in order.

Respectfully submitted,



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